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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 10/2018 concerning Waleed Abulkhair (Saudi Arabia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate, extended and clarified it in its resolution 6/4, and most recently extended it for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 5 January 2018 the Working Group transmitted to the Government of Saudi Arabia a communication concerning Waleed Abulkhair. The Government has not replied to the communication. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Waleed Abulkhair is a citizen of Saudi Arabia. He is 39 years old. He resides in Jeddah, Saudi Arabia.

5. Mr. Abulkhair is well known for promoting democratic and human rights reforms in Saudi Arabia. He is a lawyer and the founder and director of Monitor of Human Rights in Saudi Arabia, an organization that monitors and documents human rights violations in Saudi Arabia. He has been an advocate for an elected parliament, an independent judiciary, a constitutional monarchy and the recognition of human rights. He has advocated on behalf of prisoners of conscience and has written articles identifying human rights abuses and the need for legal reform. In 2012, he was awarded the Olof Palme Prize. In 2015, Mr. Abulkhair was awarded the Ludovic-Trarieux International Human Rights Prize. According to the source, the award is Europe's most prestigious award in recognition of human rights activism and was initially bestowed on Nelson Mandela.

6. In April 2012, the Government of Saudi Arabia banned him from travelling outside the country.

Arrest and detention

7. According to the source, on 29 October 2013, Mr. Abulkhair was convicted and sentenced to a three-month prison term for contempt of the judiciary and inciting public opinion against Saudi Arabia. The sentence was not implemented, but was confirmed by the Court of Appeals on 4 February 2014.

8. On 4 November 2013, his trial on a second set of charges commenced and lasted for 10 sessions until sentencing on 6 July 2014. The charges consisted of inciting public opinion against the State and its people; undermining the judicial authorities; inciting international organizations against Saudi Arabia with the intent of ruining its reputation; setting up and supervising an unlicensed association (referring to the Monitor of Human Rights in Saudi Arabia); participating in the creation of another unlicensed organization, namely, the Saudi Civil and Political Rights Association; and preparing, storing and sending information that prejudiced public order. The source maintains that the Government based its prosecution on Mr. Abulkhair's statements in the media and on Twitter criticizing the persecution of peaceful dissidents in Saudi Arabia.

9. According to the source, on 15 April 2014, while appearing at the fifth session of his trial before the Specialized Criminal Court, in Riyadh, Mr. Abulkhair was arrested. The arrest occurred after he had refused demands to sign a pledge promising to stop his human rights advocacy. The source reports that his arrest was made by a detective and that Mr. Abulkhair was not shown any warrant for his arrest.

10. The source explains that, on 28 May 2014, at the seventh session of Mr. Abulkhair's trial before the Specialized Criminal Court, the judge stated that Mr. Abulkhair had been arrested on 15 April 2014 by order of the Minister for the Interior. He also stated that Mr. Abulkhair's release was under the jurisdiction of the Minister, as provided by the Penal Law for Crimes of Terrorism and its Financing (Royal Decree No. M/16 of 27 December 2013). That legislation took effect on 1 February 2014 after ratification by the King and the publication of its full text in the official gazette, *Um al-Qura*, on 31 January 2014.

11. However, according to the source, the trial against Mr. Abulkhair, which started on 4 November 2013, could not have been initiated pursuant to the charges under the Penal Law for Crimes of Terrorism and its Financing, as that legislation did not come into force until 1 February 2014. The source notes that the charge sheet contained one reference to the Anti-Cyber Crime Law (Royal Decree No. M/17 of 26 March 2007) and no reference to the Penal Law for Crimes of Terrorism and its Financing. From 15 April 2014 onwards, the Specialized Criminal Court and the Minister for the Interior proceeded as though Mr. Abulkhair had been charged under the Penal Law for Crimes of Terrorism and its Financing.

12. In addition, the source specifies that the decision to proceed as though Mr. Abulkhair was being prosecuted under the Penal Law for Crimes of Terrorism and its Financing was communicated to Mr. Abulkhair on 28 May 2014, over five months after the trial had started and after the alleged acts that formed the basis of the charges had taken place. For those reasons, the source alleges that such a prosecution and any resulting conviction is contrary to article 11 (2) of the Universal Declaration of Human Rights.

13. The source also alleges that the arrest and detention of Mr. Abulkhair violated the Penal Law for Crimes of Terrorism and its Financing as well as the Law of Criminal Procedure (Royal Decree No. M/39 of 16 October 2001). Article 4 of that Law authorizes the Minister for the Interior to issue an arrest warrant; article 5 authorizes arrests for the specific purpose of investigating offences under the Law; article 6 authorizes investigative pretrial detention for up to six months, and an additional six months with the approval of the Specialized Criminal Court; and article 7 grants exclusive authority over the release of suspects to the Minister for the Interior. As the second trial against Mr. Abulkhair began on 4 November 2013 and was in its fifth session when the arrest took place, the source notes that Mr. Abulkhair's arrest could not have been made for the stipulated purpose of investigation and that no such investigation had been carried out as at 15 April 2014.

14. In addition, the source specifies that, on 26 June 2014, during the eighth session of the trial before the Specialized Criminal Court, Mr. Abulkhair stated that he would not attempt to further respond to the case against him. He cited a failure by the prosecutor and the Court to respond to arguments and objections raised by the defence in relation to the lack of jurisdiction of the Court, and his prior conviction and sentence on similar charges, some of which depended on the same allegations. According to the source, that amounts to a violation of the principle *non bis in idem*. Mr. Abulkhair has also raised concerns about the arbitrariness of the proceedings and about being subjected to discriminatory treatment (on the charge of participating in establishing the Saudi Civil and Political Rights Association, while being treated differently than others charged with that offence). He also raised his right to be released from pretrial detention, which had been ordered without any reasons given and without any opportunity for judicial review. The source also reports that Mr. Abulkhair has raised the use against him of prohibited treatment, including physical and psychological torture and other mistreatment, during his pretrial detention. The Court and other authorities failed to investigate or otherwise respond to, determine or remedy that alleged treatment.

15. According to the source, on 6 July 2014, Mr. Abulkhair was convicted and sentenced to a 15-year prison term, a 15-year overseas travel ban and a fine of SRI 200,000. An order was also made to shut down all websites related to him. The judge decided to suspend five years of the prison sentence.

16. On 15 February 2015, the Specialized Criminal Court of Appeal, which deals with terrorism cases, confirmed the 15-year prison term, the 15-year travel ban and the SRI 200,000 fine. It rejected the five-year suspension.

17. According to the source, Mr. Abulkhair's conviction was based on charges of seeking to discredit State legitimacy; abusing public order with respect to the State and its officials; inciting public opinion and insulting the judiciary; publicly defaming the judiciary; inciting international organizations against Saudi Arabia with the intent of ruining its reputation; making statements and documents to harm the reputation of the country; adopting an unauthorized association, being its chairman, speaking on its behalf and issuing statements and communicating through it; and preparing, storing and sending items that would prejudice public order.

18. According to the source, the sentence imposed on Mr. Abulkhair exceeded the maximum allowed by the Anti-Cyber Crime Law.

19. The source further explains that Mr. Abulkhair did not appeal the conviction or sentence. The source claims that Mr. Abulkhair believed that an appeal would be futile given the lack of respect for international norms in Saudi Arabia. Mr. Abulkhair did not initiate or participate in the process that resulted in the Specialized Criminal Court of Appeal confirming the conviction and his sentencing on 15 February 2015.

20. The source reports that, Mr. Abulkhair has been imprisoned since 15 April 2014. Specifically, on 15 April 2014, Mr. Abulkhair was taken to the Al-Ha'ir Prison, south of Riyadh. On 24 April 2014, Mr. Abulkhair was transferred to the criminal investigations detention centre in Riyadh. On 27 April 2014, Mr. Abulkhair was transferred to the Al-Malaz Prison in Riyadh. Mr. Abulkhair was then transferred to the Buraiman Prison in Jeddah until 11 August 2014, when he was then transferred back to the Al-Malaz Prison. On 4 February 2015, Mr. Abulkhair was transferred back to the Al-Ha'ir Prison. On or about 25 December 2015, he was transferred to Dhahban Central Prison, in Jeddah.

21. With regard to the justification of the detention, the source alleges that there were no allegations or evidence that Mr. Abulkhair remaining at liberty during the trial posed a risk to the public or to the legal proceedings. In addition, Mr. Abulkhair was not given notice of the authority under which he had been arrested until 28 May 2014 and was not advised of the reason why his arrest had been necessary to protect the public interest. He was not given an opportunity to make submissions as to his right to remain at liberty during the trial.

22. The source further reports that Mr. Abulkhair gave a statement to the court on 28 May 2014, in which he indicated that the Minister for the Interior had asked him to sign a pledge and that the prosecutor had threatened that he would "go to jail for years" if he refused to sign. He was then subjected to incommunicado detention for 10 days, during which time he was subjected to forced sleep deprivation, and denied access to his lawyer and to required medications for diabetes. That treatment, coupled with the failure of the authorities to undertake any investigation in that regard, and the absence of any evidence that his arrest had been necessary, supported the argument that the authorities had arrested Mr. Abulkhair for the improper purpose of securing his agreement to stop his human rights advocacy. The source further alleges that his detention can also be reasonably seen as having the purpose of hampering his ability to defend the charges against him. The source adds that Mr. Abulkhair has been pressured to confess his alleged wrongdoing, sign a formal apology and pledge to remain silent in the future.

23. The source also specifies that the Penal Law for Crimes of Terrorism and its Financing has been criticized as designed to legitimize existing extrajudicial practices of the Saudi State by cloaking them in the rule of law, and as a tool to silence peaceful dissent and repress growing public debate about the need for reform.

24. With regard to the charges, the source alleges that they are vague and overbroad and fail to meet the test of certainty for criminal offences. As such, the charges provide a "standardless sweep" that requires prosecutors and judges to apply subjective standards to determine what constitutes an offence, confers unrestricted judicial discretion and allows prosecutors and judges to pursue personal agendas.

25. The source also highlights that Saudi Arabia has no written code of criminal offences. Article 1 of the Law of Criminal Procedure states that:

> Courts shall apply sharia principles, as derived from the Qur'an and Sunnah ... to the cases that are brought before them. They shall also apply laws promulgated by the State that do not contradict the provisions of the Qur'an and Sunnah, and shall comply with the procedure set forth in this Law. The provisions of this Law shall apply to criminal cases that have not been decided and to proceedings that have not been completed prior to the implementation thereof.

Article 3 provides that "[n]o penal punishment shall be imposed on any person except in connection with a forbidden and punishable act, whether under sharia principles or under statutory laws". Therefore, according to the source, prosecutors are free to lay charges based on allegations that lawful acts have violated Islamic law. Courts must then apply subjective standards to interpret sharia principles and determine whether the alleged act(s) are "forbidden and punishable" and therefore constitute a crime.

26. The source adds that the charges were brought under the Penal Law for Crimes of Terrorism and its Financing, which does not define or even name any specific acts that could constitute a crime of terrorism and therefore be subject to its provisions. Indeed, article 1 (a) of the Law lists two extremely broad categories of intended consequences that could render acts or omissions criminal: "acts/omissions intended to disturb public order,

destabilize the security of society or the stability of the State, expose its national unity to danger"; and those that "harm the reputation of the State or its standing, ... endanger any of the State facilities or its natural resources, force any of its authorities to do or abstain from doing something". The source also explains that intent may not be an element of these consequences.

27. Therefore, according to the source, these categories are so broad that they require subjective definitions and enable the criminalization of virtually any peaceful exercise of expression, association or assembly, seen as having the potential to stimulate criticism of the Government or debate on issues of public interest. As a consequence, the source explains that the impugned statements and acts that form the basis of such charges are often not in dispute but, because the determination of whether such acts constitute crimes is so subjective, it is not possible to present a defence.

28. Moreover, regarding the rights to fair trial and the legality of the proceedings, the source argues that the Specialized Criminal Court is not competent to provide a fair trial in accordance with international law standards and in particular cannot ensure a determination by a "competent, independent and impartial tribunal", as required by the Universal Declaration of Human Rights. The source claims that the provisions of the Penal Law for Crimes of Terrorism and its Financing grant powers in respect of arrest warrants and detentions to the Minister for the Interior. It also gives the court the authority to hear witnesses and experts without the presence of the defendant or his lawyer and to convict on evidence that the defendant is incapable of knowing or challenging. There is no requirement to inform the defendant or his lawyer of the content of the testimony and it restricts a suspect's right to access to a lawyer for an undefined time, the period to be determined by the investigating agency. This would deny access to a lawyer during interrogation, in contravention of the provisions of the Saudi Law of Criminal Procedure.

29. According to the source, with regard to the conditions of detention and treatment, between 15 April and 6 July 2014, Mr. Abulkhair was subjected to incommunicado detention, denied access to a lawyer, and subjected to forced sleep deprivation by exposure to constant bright light, and solitary confinement. He has also been denied access to required diabetes medication.

30. Mr. Abulkhair suffers from diabetes and a chronic condition that requires a special diet. The source further reports that, since his arrest, his weight has dropped by 15 kilograms. After the December 2015 transfer to Dhahban Central Prison, the authorities denied requests for a medical examination and access to the food required to control his condition. In March 2016, an additional request for examination of an injury to his hand was also refused. On 7 June 2016, he commenced a hunger strike to protest his ill-treatment. He ended his hunger strike on 12 June 2016, in response to prison authorities promising a medical examination, daily visits to the prison library and permission to receive books. On 19 June 2016, he was examined by a doctor, who found a broken finger and told him that another medical appointment would be scheduled.

31. In addition, the source explains that, on 18 April 2015, Mr. Abulkhair lodged a complaint to the prison administration regarding beatings he had undergone on the same day. On 21 April 2015, as retaliation for lodging the complaint, Mr. Abulkhair was further beaten, threatened and insulted by another prisoner. In May 2016, the Committee against Torture noted that reports from 2014 of in-custody torture of Mr. Abulkhair had not been investigated or remedied. On 8 March 2016, he was physically assaulted by a prison official reportedly because he had expressed his objection to, and protested against, the beating of a fellow prisoner who was experiencing discriminatory treatment owing to his Ethiopian heritage.

32. Therefore, according to the source, such treatment is in contravention of articles 3, 5 and 11 of the Universal Declaration of Human Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Saudi Arabia on 23 September 1997); and articles 4, 35, 38, 39 and 70 of the Law of Criminal Procedure.

33. Finally, the source reports that Mr. Abulkhair has not been allowed any visitors since his transfer to Dhahban Central Prison in December 2015. However, he has been allowed phone calls.

Joint communications by special procedures

34. Mr. Abulkhair has been the subject of five joint five urgent appeals (SAU 12/2017, sent on 22 December 2017; SAU 4/2016, sent on 1 July 2016; SAU 14/2014, sent on 8 December 2014; SAU 5/2014, sent on 24 April 2014; and SAU 9/2012, sent on 12 July 2012) by the Working Group on Arbitrary Detention and/or other special procedures mandate holders. The Working Group acknowledges having received responses from Saudi Arabia on all these urgent appeals except that of 22 December 2017.

Response from the Government

35. On 5 January 2018, the Working Group transmitted allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 6 March 2018, detailed information about the current situation of Mr. Abulkhair and any comments on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify his arrest and continued detention, and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular with the human rights treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure Mr. Abulkhair's physical and mental integrity.

36. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

37. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

39. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[1] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[2] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3]

Category I

40. The Working Group will first determine whether it is clearly impossible to invoke any legal basis to justify Mr. Abulkhair's arrest and detention from 15 April 2014 that would render it arbitrary in terms of category I.

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[1] See General Assembly resolution 72/180, fifth preambular para.; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; and Human Rights Council resolutions 6/4, para. 1 (a), and 10/9.

[2] See opinion No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[3] See opinion No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

41. According to the information provided by the source, which the Government has not rebutted, Mr. Abulkhair was arrested, charged and convicted under the Penal Law for Crimes of Terrorism and its Financing, which came into effect on 1 February 2014, months after the commencement of his trial, which started on 4 November 2013, originally for the alleged violations of the Anti-Cyber Crime Law.

42. The Working Group considers that this is an ex post facto application of the Penal Law for Crimes of Terrorism and its Financing. A law that was not in force at the time of the commission of impugned acts cannot serve as the legal basis for detention or imprisonment as punishment for the said acts. The Universal Declaration of Human Rights reaffirms this essential principle of legality, *nullum crimen sine lege*, when it resolves in article 11 (2) therein that no one shall be held guilty of penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.[4]

43. The authorities therefore cannot possibly rely upon the Penal Law for Crimes of Terrorism and its Financing as the legal basis for Mr. Abulkhair's arrest on 15 April 2014. Since Mr. Abulkhair had already been on trial when the law went into force, its writ cannot extend to cover his prior acts.

44. Similarly, Mr. Abulkhair's conviction and 15-year sentence, as well as the 15-year travel ban, the SRI 200,000 fine and the order to shut down his websites, are devoid of any prima facie legal basis. Even assuming for the sake of argument that Mr. Abulkhair's acts merited prosecution and punishment, he should not have been prosecuted and punished retroactively under the Penal Law for Crimes of Terrorism and its Financing but under the Anti-Cyber Crime Law.[5]

45. The Working Group also finds other reasons to question the legal basis for Mr. Abulkhair's arrest and detention. While the Specialized Criminal Court insisted on 28 May 2014 during the seventh session of Mr. Abulkhair's trial that he had been lawfully arrested pursuant to the order issued by the Minister for the Interior under article 4 of the Penal Law for Crimes of Terrorism and its Financing, he had not been shown any warrant at the time of his arrest on 15 April 2014 during the fifth session of his trial. Nor has the Government provided documentary evidence such as a copy of the arrest warrant to the Working Group.

46. Moreover, the Working Group recalls that it previously questioned the legality of arrest warrants issued under article 4 of the Penal Law for Crimes of Terrorism and its Financing.[6] An arrest warrant, even assuming that it has been issued by the Minister for the Interior or by delegated organs such as the Directorate of General Investigation, under article 4 of the law, does not meet the requirement that any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group is of the view that the Ministry of the Interior or its delegated organs cannot be considered as a judicial authority in this respect. The Working Group underlines that any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks legal basis.

47. The alleged legal basis for Mr. Abulkhair's arrest and detention also suffers from other serious defects. As stated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and not in accordance with procedures established by law (see A/HRC/30/37,

[4] See also article 15 of the Arab Charter on Human Rights.

[5] In its jurisprudence, the Working Group has found prosecution and imprisonment under the Anti-Cyber Crime Law and the Penal Law for Crimes of Terrorism and its Financing to be arbitrary when they result from the legitimate exercise of fundamental human rights. See opinion No. 63/2017, paras. 54–63.

[6] See opinion No. 93/2017, para. 44.

para. 12). In order to ascertain such legal basis, the authorities should have informed Mr. Abulkhair of the reasons for his arrest or charges against him when he was arrested on 15 April 2014, but this did not happen until almost a month and half later, on 28 May 2014.

48. The Working Group also expresses its grave concern at Mr. Abulkhair's incommunicado detention, solitary confinement and denial of access to a lawyer between 15 April 2014 and 6 July 2014, which prevented him from being brought promptly before a judge or from being afforded the right to take proceedings before a court to decide on the lawfulness of his detention. Articles 8, 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention.

Penal Law for Crimes of Terrorism and its Financing

49. The Working Group will elaborate further on the propriety of detention under the articles 1, 4, 6 and 16 of the Penal Law for Crimes of Terrorism and its Financing in view of the principle of legality and its effect on the right to a fair trial and other freedoms in Mr. Abulkhair's case.

50. One of the fundamental guarantees of due process is the principle of legality (*nullum crimen, nulla poena sine lege*), including: (a) the principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*); (b) the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta*); (c) the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and (d) the prohibition against uncodified, i.e. unwritten, or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta*). This means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.[7]

51. Article 1 (a) of the Penal Law for Crimes of Terrorism and its Financing defines the crimes of terrorism as:

> An act committed by an offender in furtherance of a criminal enterprise, whether individually or collectively, directly or indirectly, which is intended to disturb public order, or undermine the security of society and the stability of the state or which endangers national unity, the Constitution (Basic Law) or any part thereof, or which defames the state or position, or causes damage to a state facility or natural resource, or which attempts to compel an officer or employee to take action or refrain from taking action within the scope of his duties due to threats.

52. The Working Group notes that such vaguely and broadly worded provisions, which cannot qualify as *lex certa*, violate the due process of law undergirded by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights. Furthermore, the Working Group notes that the Human Rights Committee found, in its case law, that detention pursuant to proceedings that were incompatible with article 15 of the International Covenant on Civil and Political Rights were necessarily arbitrary within the meaning of article 9 (1) of the Covenant.[8] By the same logic, proceedings in violation of article 11 (2) of the Universal Declaration of Human Rights are arbitrary for the purpose of article 9 of the Declaration.[9]

53. In the Working Group's view, the principle of legality further requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights (*nullum crimen, nulla poena sine lege apta*). Hence, the penal punishment must, at the minimum, satisfy the principle of necessity (*nullum crimen, nulla poena sine*

[7] Claus Kreß, "Nulla poena nullum crimen sine lege" in *Max Planck Encyclopedia of Public International Law*, vol. VII, Rüdiger Wolfrum, ed., 2010, pp. 889–890; Payam Akhavan, "Judicial Guarantees" in *The 1949 Geneva Conventions: A Commentary*, Andrew Clapham, Paola Gaeta and Marco Sassoli, eds., 2015, p. 1227. See also Bundesverfassungsgericht judgment, BVerfGE 26, 41 (42 f.) 14 May 1969 (Germany); 9-2 KCCR 312 (322), 96 Hun-Ga 16, 25 September 1997 (Republic of Korea).

[8] Human Rights Committee, *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4 (2).

[9] See also articles 14 (1) and 15 of the Arab Charter on Human Rights.

necessitate), the prerequisite of injustice (*nullum crimen, nulla poena sine injuria*) and the principle of guilt (*nullum crimen, nulla poena sine culpa*) in the interest of formal and material justice.

54. The Working Group considers that the provisions of the Penal Law for Crimes of Terrorism and its Financing, which allowed a 15-year prison term and a 15-year overseas travel ban for harmless online and offline comments, are neither necessary to protect the public or private interests against injury nor are they proportionate to guilt. Punishment should fit the crime, not the criminal. In addition, the requirement of *lex praevia, lex stricta, lex certa* and *lex scripta* must be construed more strictly in proportion to the severity of the prescribed punishment.

55. The Working Group notes that laws that are vaguely and broadly worded may have a deterrent effect on the exercise of the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, as they have the potential for abuse, including the arbitrary deprivation of liberty.[10]

56. The Working Group has also expressed its concern that antiterrorism laws "by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention" with the consequence that "legitimate democratic opposition ... becomes a victim in the application of such laws" (see E/CN.4/1995/31, para. 25 (d)).[11] Notably, with regard to article 15 (1) of the Covenant, the prohibition of terrorist conduct must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct (see E/CN.4/2006/98, para. 46).

57. Moreover, a valid arrest and search warrant must be issued not by the executive branch that carries out the arrest or search, but by a competent, independent and impartial judicial authority; and legal assistance must be available at all stages of detention to guarantee the right to liberty and security of person and protection from arbitrary arrest and detention or arbitrary interference with a person's privacy, family, home and correspondence under articles 3, 9 and 12 of the Universal Declaration of Human Rights, as well as under the peremptory norms of customary international law.[12]

58. The Working Group therefore considers that Mr. Abulkhair's arrest, detention and imprisonment lack a legal basis and are thus arbitrary and fall under category I.

Category II

59. The source argues that Mr. Abulkhair's trial and imprisonment are arbitrary, falling within category II, as they resulted from the legitimate exercise of his rights and freedoms.

60. The Working Group recalls that the right to hold and express opinions, including opinions that are not in accordance with official government policy, is protected by article 19 of the Universal Declaration of Human Rights. The Government must respect, protect and uphold the right to freedom of opinion and expression, even where opinions have been expressed which are not to its liking.

61. The Working Group notes that the Human Rights Committee, in paragraph 34 of its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions on the freedom of expression must not be overbroad; must conform to the principle of proportionality; must be appropriate to achieve their protective function; must be the least intrusive instrument among those which might achieve their protective

[10] Opinion No. 88/2017, para. 50; No. 57/2017, para. 65; No. 56/2017, para. 71; No. 51/2017, para. 56; No. 41/2017, para. 98; No. 36/2017, para. 102; and No. 20/2017, para. 50.

[11] See opinion No. 41/2017, para. 99; No. 36/2017, para. 103; and No. 20/2017, para. 51.

[12] See also articles 14 and 21 of the Arab Charter on Human Rights.

function; and must be proportionate to the interest to be protected. It is worth noting that the value placed by the Covenant upon uninhibited expression concerning figures in the public and political domain is particularly high in the context of public debate in a democratic society. The Working Group finds no reason to doubt that the same holds with respect to restrictions upon the right to freedom of opinion and expression when article 19 is read in conjunction with article 29 (2) of the Universal Declaration of Human Rights.

62. The Working Group considers that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties and that all public figures, including those exercising the highest political authority such as heads of State and Government, are legitimately subject to criticism and political opposition. The Working Group notes that the Human Rights Committee, in paragraph 38 of its general comment No. 34 (2011) on the freedoms of opinion and expression, specifically expressed its concern regarding laws prohibiting disrespect for authority, the protection of the honour of public officials and criticism of institutions. It also stated that laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. In paragraph 42, the Committee stated that the penalization of a media outlet, publishers or journalist solely for being critical of the Government or the political or social system espoused by the Government can never be considered to be a necessary restriction of the freedom of expression.

63. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb (see A/HRC/17/27, para. 37). Even the statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection. Furthermore, the Human Rights Council, in its resolution 12/16, stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant (see General Assembly resolution 12/16, para. 5 (p) (i)).

64. In the present case, the Government does not refute the allegation that Mr. Abulkhair was charged and convicted for his peaceful online and offline condemnation of the Government's persecution of peaceful dissidents. The international human-rights community voiced its criticism of the Government's charge sheet, which consisted of little more than excerpts from statements he had made to various media outlets and tweets that criticized the harsh court sentences imposed on peaceful dissidents.[13]

65. The Working Group is of the view that Mr. Abulkhair has been arrested, convicted and sentenced for his exercise of the right to freedom of opinion and expression, which is protected by article 19 of the Universal Declaration of Human Rights. This can be seen in the repeated attempts by the authorities, resorting to the threat and use of arrest, to pressure Mr. Abulkhair into "confessing" his alleged wrongdoing and into pledging to stop his human rights advocacy, as well as the Specialized Criminal Court's order to shut down his website.

66. Nor has the Government provided any grounds for restricting Mr. Abulkhair's freedom of opinion and expression. Article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of that right must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

67. The Working Group also concurs with the observation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that the definition of terrorism in the Penal Law for Crimes of Terrorism and its Financing fails to comply with international human rights standards of legal certainty, as any definition of terrorism should be confined to acts or threats of violence that are committed for religious, political or ideological motives, and that are aimed at putting the

[13] See, for example, Office of the United Nations High Commissioner for Human Rights (OHCHR), "Saudi Arabia: Pillay concerned by harsh sentences against human rights defenders", 10 July 2014.

public or section of the public in fear or to coerce a Government or international organization to take or refrain from taking a particular action. The Working Group also agrees with the Special Rapporteur's statement that, contrary to the basic international human rights standards, article 1 of the law has enabled the criminalization of a wide spectrum of acts of peaceful expression, which are viewed by the authorities as endangering "national unity" or undermining "the reputation or position of the State".[14]

68. The Working Group adds that the above considerations apply, mutatis mutandis, vis-à-vis the violation of freedom of association under article 20 of the Universal Declaration in Mr. Abulkhair's conviction and sentence under the Penal Law for Crimes of Terrorism and its Financing for his role in the creation of the Saudi Civil and Political Rights Association. Again, the Government has provided no legitimate justification for criminalizing the Saudi Civil and Political Rights Association under the legal trappings of the licensing procedure.

69. Given the above-mentioned observations, the Working Group considers that Mr. Abulkhair's deprivation of liberty is arbitrary, as it resulted from his exercise of the rights or freedoms guaranteed under articles 13, 19 and 20 of the Universal Declaration of Human Rights. His deprivation of liberty, therefore, falls within category II.

Category III

70. Given its finding that Mr. Abulkhair's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Abulkhair should have taken place. However, the trial having taken place, the Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Mr. Abulkhair were grave enough to give his deprivation of liberty an arbitrary character, so that it falls within category III.

71. The Working Group notes that the Government has chosen not to challenge the prima facie credible allegations made by the source that Mr. Abulkhair had been previously convicted and sentenced for charges based on the identical facts. The doctrine *of ne bis in idem* is another fundamental element of the international norms on detention that is universally recognized in countries where the rule of law prevails and is inherent in the prohibition of arbitrary detention (art. 10) and the right to a fair trial (art. 11) that are stipulated in the Universal Declaration of Human Rights.[15]

72. According to the information provided by the source, which the Government chose not to contest, Mr. Abulkhair was arrested without a warrant and was not promptly informed of the reasons for his arrest or of the charges against him. Such an arrest is arbitrary and seriously undermines the capacity to mount an appropriate legal defence, violating article 9 of the Universal Declaration of Human Rights as well as principles 2 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[16]

73. With regard to the Specialized Criminal Court, the Working Group shares the concerns expressed in 2016 by the Committee against Torture in its concluding observations on the second periodic report of Saudi Arabia (CAT/C/SAU/CO/2 and Corr.1) that the Court is insufficiently independent of the Ministry of the Interior. In that regard, the Committee recommended that the Government strengthen the independence of the Specialized Criminal Court from the Ministry of the Interior and ensure that judges are made aware of their obligation to consider defendants' allegations regarding torture or ill-treatment by investigators for the purpose of obtaining confessions; and that it consider as inadmissible as evidence any confessions found to have been obtained through torture or

[14] See OHCHR, "United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Saudi Arabia: preliminary findings of the visit to Saudi Arabia", 4 May 2017.

[15] See opinion No. 36/1999, paras. 8–10; see also articles 13 and 14 of the Arab Charter on Human Rights.

[16] See opinion No. 63/2017, para. 66; No. 21/2017, para. 46; and No. 48/2016, para. 48.

ill-treatment, except when such confessions are evidence in a case against the alleged perpetrator of the torture or ill-treatment (see CAT/C/SAU/CO/2 and Corr.1, paras. 17–18).

74. Again, the Government has not disputed that, between 15 April 2014 and 6 July 2014, Mr. Abulkhair was subjected to incommunicado detention for 10 days, forced sleep deprivation, denial of access to his lawyer and denial of access to required medications for diabetes. Furthermore, the incommunicado detention entailed the denial of his right to notify and communicate with his family and lawyer in accordance with principles 15, 16, 17, 18 and 19 of the Body of Principles, and his right to be brought promptly before a judge and to be tried within a reasonable time as stipulated in principles 37 and 38 of the Body of Principles. Such treatment negated his recognition as a person before the law and prejudiced his right to a fair and public hearing. All in all, the source alleged that his incommunicado detention resulted in the cumulative violation of articles 6, 8, 9, 10 and 12 of the Universal Declaration of Human Rights.[17]

75. The Working Group recognizes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has defined solitary confinement in excess of 15 days as "prolonged", at which point some of the harmful psychological effects of isolation can become irreversible.[18] Such prolonged solitary confinement may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture (see A/63/175, paras. 56 and 77). Prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture (see A/56/156, para. 14). The prohibition of torture is expressly stated in article 5 of the Universal Declaration of Human Rights. The Working Group reminds the Government of Saudi Arabia of the legal obligations undertaken by it as a State party to the Convention against Torture.[19]

75. The Government has not denied the allegation that it has resorted to the threat and use of coercion, such as beatings that amount to torture, to force Mr. Abulkhair to make a confession. No fair trial is possible under such an atmosphere of fear. In its concluding observations on the second periodic report of Saudi Arabia in 2016, the Committee against Torture noted that the Government "did not indicate whether any officials have been prosecuted for the reported torture and ill-treatment in detention of human rights lawyer Waleed Abu al-Khair [sic], in 2014" before calling upon the Government to "ensure that all instances and allegations of torture and ill-treatment, including those raised in the case of Waleed Abu al-Khair [sic], are promptly, effectively and impartially investigated and that perpetrators are prosecuted and sentenced in accordance with the gravity of their acts, as required by article 4 of the Convention" (see CAT/C/SAU/CO/2 and CAT/C/SAU/CO/2/Corr.1, paras. 16 and 18).

77. In the light of the foregoing, the Working Group concludes that the violations of Mr. Abulkhair's rights to a fair trial are of such gravity as to render his deprivation of liberty arbitrary, falling within category III.

Category V

78. The Working Group will now examine whether Mr. Abulkhair's deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

79. The Working Group notes that Mr. Abulkhair is the founder and director of the Monitor of Human Rights in Saudi Arabia, an organization that monitors and documents human rights violations in his country, and that he has been an advocate for an elected parliament, an independent judiciary, a constitutional monarchy and the recognition of

[17] See also articles 12, 14, 21, 22 and 23 of the Arab Charter on Human Rights.

[18] See A/66/268, paras. 26 and 61. See also rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which likewise refers to solitary confinement for a time period in excess of 15 consecutive days as prolonged solitary confinement (see General Assembly resolution 70/175, annex).

[19] See Opinion No. 10/2011, para. 19; No. 11/2011, para. 15; and No. 17/2011, para. 18.

human rights, as well as a champion for prisoners of conscience and legal reform. He also received the Olof Palme Prize in 2012 and the Ludovic-Trarieux International Human Rights Prize in 2015.

80. In this sense, given his status as a prominent human rights defender and his record of being persecuted for his work on multiple occasions, the Working Group concludes that his deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

81. In the discussion presented above concerning the application of category II to the present case, the Working Group has already established that Mr. Abulkhair's arrest, detention, prosecution and imprisonment resulted from his exercise of the right to freedom of expression and association. When it is established that deprivation of liberty resulted from the active exercise of civil and political rights, there is a strong presumption that the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on political or other views.[20]

82. The Working Group cannot help but notice that Mr. Abulkhair's political views and convictions are clearly at the centre of the present case and that the authorities have displayed an attitude towards him that can only be characterized as discriminatory. Indeed, he has been the target of persecution and there is no explanation for this other than his exercise of the right to express such views and convictions.

83. For these reasons, the Working Group considers that Mr. Abulkhair's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination based on political or other opinion, as well as on his status as a human rights defender, aimed at and resulting in ignoring the equality of human beings. His deprivation of liberty therefore falls under category V.

84. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case: to the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on torture and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

85. The Working Group notes that the present opinion is only one of several opinions in which the Working Group finds the Government in violation of its international human rights obligations in Saudi Arabia.[21] The Working Group is concerned that this indicates a systemic problem with arbitrary detention in Saudi Arabia, which, if it continues, may amount to a serious violation of international law. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.

Disposition

86. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Waleed Abulkhair, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 19, 20 and 25 of the Universal Declaration of Human Rights, is arbitrary and falls within Categories I, II, III and V.

[20] See opinion No. 88/2017, para. 43.

[21] The Working Group found the deprivation of liberty of person(s) to be arbitrary in decisions Nos. 60/1993, 19/1995 and 48/1995, and in its opinions Nos. 8/2002, 25/2004, 34/2005, 35/2005, 9/2006, 12/2006, 36/2006, 37/2006, 4/2007, 9/2007, 19/2007, 27/2007, 6/2008, 11/2008, 13/2008, 22/2008, 31/2008, 36/2008, 37/2008, 21/2009, 2/2011, 10/2011, 11/2011, 17/2011, 18/2011, 19/2011, 30/2011, 31/2011, 33/2011, 41/2011, 42/2011, 43/2011, 44/2011, 45/2011, 8/2012, 22/2012, 52/2012, 53/2012, 32/2013, 44/2013, 45/2013, 46/2013, 14/2014, 32/2014, 13/2015, 38/2015, 52/2016, 61/2016, 10/2017, 63/2017 and 93/2017.

87. Consequent upon the opinion rendered, the Working Group requests the Government of Saudi Arabia to take the steps necessary to remedy the situation of Mr. Abulkhair without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights.

88. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Abulkhair immediately and accord him an enforceable right to reparation, including compensation and other reparations, in accordance with international law.

89. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Abulkhair, including his allegations of torture, and to take appropriate measures against those responsible for the violation of his rights.

90. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights.

91. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

Follow-up procedure

92. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Abulkhair has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Abulkhair;

(c) Whether an investigation has been conducted into the violation of Mr. Abulkhair's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Saudi Arabia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

93. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

94. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

95. The Government should disseminate through all available means the present opinion among all stakeholders.

96. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[22]

[*Adopted on 19 April 2018*]

[22] See Human Rights Council resolution 33/30, paras. 3 and 7.